In The

Supreme Court of the United States

October Term, 1998

MARK ROTELLA,

Petitioner,

v.

DALLAS PSYCHIATRIC ASSOCIATES, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents a question twice left open for resolution by this Court. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 117 S. Ct. 1984, 1992 (1997); *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 157 (1987):

> In calculating the statute of limitations for a civil RICO claim, does the cause of action accrue when the injury alone happens, or when the plaintiff has both suffered the injury and discovered that it results from a pattern of RICO activity?

LIST OF PARTIES

Petitioner is Mark Rotella.

Respondents are Angela M. Wood, M.D.; Gary Lee Etter, M.D. P.A.; William M. Pederson, M.D.; Grover Lawlis, M.D.; David R. Baker, M.D.; Larrie W. Arnold, M.D.; Fred L. Griffin, M.D.; Leslie H. Secrest, M.D.; John M. Zimburean, M.D.; Bradford M. Goff, M.D.; Ronald Fleischmann, M.D.; Dallas Psychiatric Associates; David R. Baker, M.D. P.A.; Larrie W. Arnold, M.D. P.A.; Leslie H. Secrest, M.D.P.A.; William M. Pederson, M.D.P.A.; Fred L. Griffin, M.D. P.A.; Ronald Fleischmann, M.D. P.A.; Bradford M. Goff, M.D. P.A.; Grover Lawlis, M.D. P.A.; Angela M. Wood, M.D. P.A.; John M. Zimburean, M.D. P.A.; Gary Lee Etter, M.D.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 147 F.3d 438, and reprinted at Pet. App. 1. The memorandum opinion and order of the United States District Court for the Northern District of Texas is unreported and reprinted at Pet. App. 6.

JURISDICTION

The court of appeals entered judgment on July 30, 1998 and denied a timely petition for rehearing on August 28, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). In addition, this case raises an important Circuit conflict. *See* S. Ct. R. 10(a).

STATUTE INVOLVED

15 U.S.C. § 15b[1] provides in part:

> Any action to enforce any cause of action under . . . this title shall be forever barred unless commenced within four years after the cause of action accrued.

[1] This case involves a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961-68. Because that statute has no statute of limitations, this Court has determined that RICO causes of action should be governed by the statute of limitations provision found in section 15b of the Clayton Act. *Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984, 1987 (1997).

STATEMENT OF THE CASE

This is an appeal from a summary judgment in a civil RICO claim. The District Court ruled that the claim was barred by limitations. The choice of an accrual rule for the RICO claim determines whether the decisions below are correct.

Mark Rotella was admitted to a psychiatric hospital in February of 1985, when he was only sixteen years old. He was confined there, against his will and under the mistaken belief that his doctors could force him to stay, until he was eighteen. During those 479 days of confinement, he had no idea that his treating doctors were engaged in a pattern of racketeering activity. Later, he learned that Psychiatric Institutes of America, the owner of the hospital, had pleaded guilty to federal charges, including criminal RICO violations. The plea agreement was reached in June of 1994.

It is undisputed that Mr. Rotella did not learn about the pattern of racketeering activity until eight years after his release from the hospital. The racketeering activity consisted of a fraudulent scheme that included financial incentives to doctors who unnecessarily admitted, treated, and retained innocent patients at psychiatric hospitals across the country. This scheme was accomplished, in part, by:

- directly providing "incentive bonuses" based on the average daily census of the hospital;
- entering into personal service contracts with doctors who referred patients to the hospitals;

- disguising incentive payments to doctors and paying for services they were not expected to perform; and
- falsifying time and attendance records to disguise inflated compensation based on admissions to the hospital.

Mr. Rotella filed suit in July of 1997, less than four years after he first discovered any facts that would cause him to suspect a pattern of racketeering activity. He alleged that, consistent with this scheme, he was hospitalized for the sole purpose of exhausting his insurance benefits, regardless of any legitimate treatment goals.

The Defendants all moved for summary judgment based on the statute of limitations. Although the RICO statute provides no statute of limitations for private causes of action, this Court has determined to use the statute of limitations of the Clayton Act, found in 15 U.S.C. § 15b. *See Klehr v. A.O. Smith Corp.*, 117 S. Ct. 1984, 1987 (1997); *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 152-56 (1987). Under this statute, a cause of action is barred if it is not brought within four years of the time it accrues.

The motions for summary judgment acknowledged that the discovery rule applies to the accrual of a civil RICO claim, but contended that the discovery of an injury alone triggers accrual. Therefore, the Defendants asserted the last possible date Mr. Rotella's cause of action could have accrued was upon his release from the hospital in 1986. Under that theory, the limitations period expired in 1990.

Mr. Rotella argued that because a RICO cause of action requires proof of racketeering activity, the claim cannot accrue until a plaintiff discovers both an injury and a pattern of RICO activity. Thus, Mr. Rotella's cause of action could not accrue until he first discovered the pattern of activity in 1994, and his 1997 lawsuit was timely because it was filed within four years of accrual.

The District Court granted all motions for summary judgment. Mr. Rotella appealed to the Court of Appeals for the Fifth Circuit. After acknowledging the split in the Circuits, the Fifth Circuit chose to follow the injury discovery rule, and affirmed.

REASONS FOR GRANTING THE WRIT

1. This Court has reserved this question for decision twice in the past.

First, this Court expressly left open the question of what triggers the accrual of a civil RICO cause of action in *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 157 (1987) ("[W]e have no occasion to decide the appropriate time of accrual for a RICO claim.").

Second, in *Klehr* this Court expressly acknowledged a "major difference among the Circuits" on the question of whether a RICO claim accrues upon discovery of injury alone or upon discovery of injury plus a pattern of racketeering activity. However, that question was "clearly not at issue." *Klehr*, 117 S. Ct. at 1992. Accordingly, the Court wrote, "In these circumstances, we believe we should not consider differences among the various discovery accrual

rules used by the Circuits." Saving the question for another day, the Court concluded, "We shall . . . wait for a case that clearly presents these, or related issues . . . before we attempt to resolve them." *Id.*

In *Klehr* this Court expressly reserved the very question presented here: whether an injury-and-pattern discovery rule should apply to RICO claims. As this Court wrote, "We do **not** say that a pure injury accrual rule always applies without modification in the civil RICO setting in the same way it applies in traditional antitrust cases. For example, civil RICO requires not just a single act, but rather a 'pattern' of acts. Furthermore, there is some debate as to whether the running of the limitations period depends on the plaintiff's awareness of certain elements of the cause of action." *Id.* at 1990 (emphasis added).

In his concurring opinion in *Klehr*, Justice Scalia (joined by Justice Thomas) observed that the Court left "reduced but unresolved the well-known split in authority that prompted us to take this case." *Id.* at 1994 (Scalia, J. concurring). As a consequence, Justice Scalia observed correctly that "no one will know for sure which rule is right – until, at some future date we . . . finally summon up the courage to 'unravel,' as one commentator has put it, 'the mess that characterizes civil RICO accrual decisions.' " *Id.*

This case presents an appropriate vehicle for unraveling those decisions, because it "clearly presents" the issue in an outcome-dispositive way.

2. The Circuits are sharply divided on this question.

Since this Court adopted the Clayton Act's four-year statute of limitations for RICO actions in 1987, the Circuits have been sharply divided about when a cause of action accrues. This Court itself has described the discrepancy as a "major difference among the Circuits," *Klehr*, 117 S. Ct. at 1992, and a "well-known split in authority." *Id.* at 1994.

Five Circuits – the Third, Sixth, Eighth, Tenth and Eleventh Circuits – have held that a RICO claim does not accrue until a plaintiff discovers both an injury and a pattern of RICO activity. *See, e.g., Caproni v. Prudential Securities, Inc.*, 15 F.3d 614, 619 (6th Cir. 1994); *Glessner v. Kenny*, 952 F.2d 702, 706 (3rd Cir. 1991); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820-21 (10th Cir. 1990); *Bivens Gardens Office Bldg., Inc. v. Barnett Bank, Inc.*, 906 F.2d 1546, 1553-54 (11th Cir. 1990).[2]

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[2] When discussing the Circuit split in *Klehr*, this Court listed only the Eighth, Tenth and Eleventh Circuits on the side of the injury-and-pattern discovery rule. But the Court noted, "The Third Circuit believes that the limitations period starts to run when a plaintiff knew or should have known that the RICO claim (including a 'pattern of racketeering activity') existed, but the Third Circuit has added an important exception. . . . " *Klehr*, 117 S. Ct. at 1989. Without the "last predicate act" exception rejected by this Court in *Klehr*, the Third Circuit is left with the injury-and-pattern discovery rule, and should be counted on that side of the ledger.

The Circuit tally in *Klehr* also omits the Sixth Circuit from its list of injury-and-pattern discovery rule Circuits. However, that Circuit also embraces the injury-and-pattern discovery rule. *See*

Six Circuits – the First, Second, Fourth, Fifth, Seventh, and Ninth Circuits – have held that a RICO cause of action accrues upon discovery of an injury alone. *See Rotella v. Wood*, 147 F.3d 438, 440 (5th Cir. 1998); *Detrick v. Palpina*, 108 F.3d 529, 540 (4th Cir. 1997); *Grimmett v. Brown*, 75 F.3d 506, 512-13 (9th Cir. 1996); *Bingham v. Zolt*, 66 F.3d 553, 559 (2nd Cir. 1995); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992); *Rodriguez v. Banco Cent.*, 917 F.2d 664, 665-66 (1st Cir. 1990).

The parties may quibble about the exact numbers of the Circuit split. But however heads are counted, this Court has acknowledged that a deep division of authority exists on the operation of an important federal statute. That statute, by definition, must implicate interstate commerce, and the accrual dilemma is likely to recur. Only this Court can replace the patchwork of authority that now exists with a uniform national rule.

3. This case "clearly presents" the issue reserved in *Klehr*.

In *Klehr*, this Court chose to wait and resolve the Circuit split on accrual of a RICO action until it was presented with a case that "clearly presents these . . . issues." Here, these issues not only are "clearly presented," they are dispositive.

Caproni v. Prudential Securities, Inc., 15 F.3d 614, 619 (6th Cir. 1994) ("a civil RICO cause of action begins to accrue as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern").

Because the *Klehr* plaintiffs' claim was barred no matter which of these two rules it applied, this Court chose not to make a choice between the two accrual rules. In this case, however, the choice between the injury discovery rule and the injury-and-pattern discovery rule is outcome-determinative.

If Mark Rotella's RICO cause of action accrued when he was injured, then it accrued during his hospitalization in 1985-86, when he was a minor. Under the injury discovery rule, his cause of action expired in 1990 at the latest, four years after he reached majority. Thus, his 1997 lawsuit would be barred by limitations.

However, if his cause of action did not accrue until he both suffered a hospital-related injury and discovered the pattern of RICO activity, his lawsuit is not time-barred. The undisputed evidence is that no discovery of racketeering activity happened until 1994. Thus, under the injury-plus-discovery rule, the four-year period began to run in 1994, and Mr. Rotella's 1997 complaint was filed timely.

4. The injury-discovery rule is harsh and should be rejected.

This case also demonstrates the harshness of the injury-discovery rule. If his claim accrued while Mark Rotella was hospitalized, he would be charged with uncovering racketeering acitivities while he was a teen-aged mental patient. And, he would have been required to make judgments about his doctors' conduct when he was being treated by those very doctors, who provided his only contact with reality. Moreover, he would be

charged with discovering an elaborate scheme of deception so carefully disguised that federal prosecutors considerably more knowledgeable and sophisticated than Mark Rotella were not able to expose it until 1994 – four years after Mr. Rotella's limitations period would have expired under an injury discovery rule. Holding Mr. Rotella to that kind of standard effectively bars any remedy to him. His situation demonstrates why the injury-discovery rule is inappropriate and unduly harsh for RICO cases.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Mark ROTELLA, Plaintiff-Appellant,
v.
Angela M. WOOD, MD, et al., Defendants, Angela M. Wood, MD; Gary Lee Etter, MD PA; William M. Pederson, MD; Grover Lawlis, MD; David R. Baker, MD; Larrie W. Arnold, MD; Fred L. Griffin, MD; Leslie H. Secrest, MD; John M. Zimburean, MD; Bradford M. Goff, MD; Dallas Psychiatric Associates; David R. Baker, MD PA; Larrie W. Arnold, MD PA; Leslie H. Secrest, MD PA; William M. Pederson, MD PA; Fred L. Griffin, MD PA; Bradford M. Goff, MD PA; Grover Lawlis, MD PA; Angela M. Wood, MD PA; John M. Zimburean, MD PA; Gary Lee Etter, MD, Defendants-Appellees.

No. 97-11279
Summary Calendar
Untied States Court of Appeals,
Fifth Circuit,
July 30, 1998

Kevin Hampton Dubose, Richard Phillips Hogan, Jr., Holman, Hogan, Dubose & Townsend, Richard Warren Mithoff, Mithoff & Jacks, Houston, TX, Robert Franklin Andrews, Andrews & Cirkiel, Fort Worth, TX, for Rotella.

Debora M. Alsup, Julie Caruthers Parsley, Thompson & Knight, Austin, TX, Jane Politz Brandt, John H. Martin, Thompson & Knight, Dallas, TX, for Wood and Etter.

Tom B. Renfro, Joseph F. Cleveland, McLean & Sanders, Fort Worth, TX, for Pederson, Baker, Arnold, Griffin, Secrest, Zimburean, Goff and Dallas Psychiatric Associates.

Charles T. Frazier, Jr., Andrea M. Kuntzman, Gregory Joseph Lensing, Cowles & Thompson, Dallas, TX, for Lawlis.

Appeal from the United States District Court for the Northern District of Texas.

Before REYNALDO G. GARZA, SMITH and BENAVIDES, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:

Mark Rotella sued a group of doctors and their related business entities under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68, for improperly conspiring to admit, treat, and retain him at Brookhaven Psychiatric Pavilion for reasons related to their own financial interests rather than the patient's psychiatric condition. The defendants moved for summary judgment based on the statute of limitations. United States District Judge John McBryde granted all motions for summary judgment, finding that Rotella's RICO cause of action accrued when he discovered his injury more than four years before he brought this action. *See Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 156, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987) (holding that civil RICO claims are subject to a four-year statute of limitations). Rotella brought this appeal from the district court's ruling, arguing that, for limitations purposes, a RICO cause of action does not accrue until a plaintiff discovers both the injury *and* the pattern of racketeering activity. Having reviewed the briefs, the summary judgment evidence, and the district court's opinion, we find that Judge McBryde applied the correct rule of law and, therefore, we affirm.

Last year, the Supreme Court acknowledged, but declined to resolve, the split among the circuits regarding

whether a RICO cause of action accrues upon the discovery of the injury alone, or upon the discovery of both the injury *and* the pattern of racketeering activity. *Klehr v. A.O. Smith Corp.*, ___ U.S. ___, 117 S.Ct. 1984, 1989, 138 L.Ed.2d 373, 384 (1997). The Court struck down only the Third Circuit's approach, which required discovery of the last predicate act for accrual of a RICO cause of action. *Id.* at 1988, 138 L.Ed.2d at 381. As such, *Klehr* does not dictate our choice between the injury discovery rule and the injury-pattern discovery rule.

As this circuit has not expressly endorsed either approach in a published opinion, we take this opportunity to join the First, Second, Fourth, Seventh, and Ninth Circuits in holding that a RICO cause of action accrues upon the discovery of the injury in question. *See Grimmett v. Brown*, 75 F.3d 506, 511 (9th Cir.1996), *cert. dism'd as improvidently granted*, 519 U.S. 233, 117 S.Ct. 759, 136 L.Ed.2d 674 (1997); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464-1465 (7th Cir.1992); *Rodriguez v. Banco Central*, 917 F.2d 664, 665-666 (1st Cir.1990); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir.1988), *cert. denied*, 490 U.S. 1007, 109 S.Ct. 1642, 1643, 104 L.Ed.2d 158 (1989); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir.1987); *see also Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1489-1490 (D.C.Cir.1989) (assuming, but not deciding, that injury discovery rule applies). We must so hold in order to remain consistent with several of our prior unpublished decisions. Furthermore, this approach is also consistent with our published precedent related to the question.

We have recently adopted the injury discovery rule in a string of unpublished decisions. In *Schwertz v.*

Zimburean, No. 96-11155, 121 F.3d 703 (5th Cir. July 25, 1997) and *Cain v. Lawlis*, No. 96-11238, 121 F.3d 704 (5th Cir. July 15, 1997), we affirmed the district court's application of the injury discovery rule. *Schwertz* relied on *Cain* and on another recent unpublished decision, *Mitchell v. Bolan*, No. 96-11168, 120 F.3d 266 (5th Cir.1997). *Cain* relied on *Schwertz* and also on *Mitchell*. *Mitchell*, in turn, affirmed a summary judgment on RICO claims for statute of limitation purposes "for essentially the reasons stated by the district court in its memorandum order." The district court in *Mitchell* expressly adopted the injury discovery rule. *Mitchell v. Bolan*, No. 4:95-CV-528-A (N.D.Tex. July 2, 1996) (McBryde, J.). Judge McBryde cited cases from the First, Second, Fourth, Seventh, and Ninth Circuits, and noted that he was "particularly impressed" with the reasoning employed by the First and Second Circuits in *Rodriguez* and *Bankers Trust*. *Mitchell*, No. 4:95-CV-528-A, slip op. at 10-11.

Contrary to Rotella's argument, our holding today does not conflict with our decisions in *Daboub v. Gibbons*, 42 F.3d 285 (5th Cir.1995) and *La Porte Const. Co. v. Bayshore Nat'l Bank*, 805 F.2d 1254 (5th Cir.1986). Although *La Porte* mentions accrual upon discovery of "the fraud," 805 F.2d at 1256, and *Daboub* speaks in terms of the defendant's conduct, 42 F.3d at 291, neither case mentions or even implies a requirement of discovery of a pattern of racketeering activity with regard to the accrual of a civil RICO cause of action. As such, these cases are fully consistent with our adoption of the injury discovery rule of accrual for civil RICO actions.

Accordingly, we hold that Judge McBryde applied the correct rule of accrual in granting summary judgment

based on the expiration of the statute of limitations. In so holding, we place the Fifth Circuit on record as in line with the First, Second, Fourth, Seventh, and Ninth Circuits' choice of the injury discovery rule of accrual for civil RICO causes of action. As such, we affirm the district court's decision below.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MARK ROTELLA,	)	
	)	
Plaintiff,	)	NO.
VS.	)	4:97-CV-555-A
	)	
ANGELA M. WOOD, M.D., ET AL.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION
and
ORDER

(Filed Oct. 21, 1997)

Came on for consideration the motions of defendants Angela M. Wood, M.D., Angela M. Wood, M.D., P.A., Gary Lee Etter, M.D., and Gary Lee Etter, M.D., P.A. (collectively "Wood"), defendants Grover Lawlis, M.D., and Grover Lawlis, M.D., P.A. (collectively "Lawlis"), and defendants Larrie W. Arnold, M.D., Fred L. Griffin, M.D., Leslie H. Secrest, M.D., John N. Zimburean, M.D., Bradford M. Goff, M.D., Ronald Fleischmann, M.D., William M. Pederson, M.D., David R. Baker, M.D., Dallas Psychiatric Associates, and Defendants Larrie W. Arnold, M.D., P.A., Leslie H. Secrest, M.D., P.A., William M. Pederson, M.D., P.A., Fred L. Griffin, M.D., P.A., Ronald Fleischmann, M.D., P.A., Bradford M. Goff, M.D., P.A., John N. Zimburean, M.D., P.A., and David R. Baker, M.D., P.A. (collectively "DPA")[1], for summary judgment. The

[1] These are all defendants remaining in this action. Claims against the others were disposed of by orders and final judgments signed September 9, 1997.

court, having considered the motions, the response of plaintiff, Mark Rotella, the record, the summary judgment evidence, and applicable authorities, finds that the motions should be granted.

This is the second action filed by this plaintiff against these defendants. The first was captioned "Mark Rotella v. William M. Pederson, M.D., et al.," No. 4:97-CV-211-A, ("Rotella I") and was terminated by the granting of defendants' motion for summary judgment on the issue of limitations by a memorandum opinion and order and final judgment signed June 20, 1997. Prior to the final disposition of that action, plaintiff had sought leave to amend his complaint to include RICO claims, which request was denied. On July 9, 1997, plaintiff filed his original complaint in this action asserting his RICO claims.

Defendants now urge that, like his prior claims, plaintiff's RICO claims are barred by limitations. For the reasons discussed in the court's memorandum opinion and order of June 25, 1996, in "John Frederick Schwertz, et al. v. John M. Zimburean, M.D., et al.," No. 4:95-CV-370-A, the court has determined that a RICO cause of action accrues at the time a plaintiff knew or should have known of his injury. Briefly, the Fifth Circuit has yet to address, in a published opinion, the question of when a RICO cause of action accrues. *Crowe v. Smith*, 856 F. Supp. 1178, 1181 (W.D. La. 1994), *rev'd on other grounds* without published opinion, 81 F.3d 155 (5th Cir. 1996).[2] Each of

[2] Upon obtaining a copy of the Fifth Circuit's unpublished opinion in *Crowe*, the court ascertained that the Fifth Circuit's

the circuits that has addressed the issue "has incorporated the principle of discovery into the accrual rule governing civil RICO actions in the particular circuit." *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 153 (8th Cir. 1991). However, the circuits differ on "the question of what the plaintiff must actually or constructively know before the limitations period will start to run." *Id.* As the district court in *Crowe* noted,

> The First, Second, Fourth, Seventh, and Ninth Circuits employ an injury-based accrual rule. Under this method, a civil RICO cause of action accrues at the time plaintiff discovered or should have discovered his injury. The Third, Eighth, Tenth and Eleventh Circuits have, on the other hand, adopted an accrual rule which applies the general discovery rule to both the pattern element and the injury element of RICO. In other words, these courts find that a civil RICO cause of action does not accrue until the plaintiff discovers or should have discovered the source of his injury and that the injury is part of a pattern.

856 F. Supp. at 1181-82 (footnotes omitted). The Third Circuit has added an additional "last predicate act" element to the accrual equation. *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130 (3d Cir. 1988). However, the United States Supreme Court determined that that interpretation of RICO was improper. *Klehr v. A. O. Smith Corp.*, 117 S. Ct. 1984, 138 L.Ed.2d 373 (1997). The

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reversal was based on its conclusion that plaintiffs' RICO claims were precluded by prior litigation between one of the plaintiffs and one of the defendants.

Supreme Court did not resolve the circuit split regarding the appropriate accrual rule to use.

Having considered the arguments in favor of the various accrual rules, and having studied the *Klehr* opinion, the court concludes that it agrees with what has been termed the majority view, which ties accrual to the time a plaintiff knew or should have known of his injury. *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1463-66 (7th Cir. 1992); *Rodriguez v. Banco Central*, 917 F.2d 664, 665-68 (1st Cir. 1990); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102-05 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 274-75 (9th Cir. 1988); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987). The court notes that this accrual rule is consistent with the Fifth Circuit description of the general accrual rule for federal claims. *Helton v. Clements*, 832 F.2d 332, 335 (5th Cir. 1987). The court also notes that the Fifth Circuit affirmed this court's decision in *Schwertz*. No. 96-11155 (5th Cir. July 7, 1997).

In this case, plaintiff's injuries were complete at the time he was discharged form Brookhaven Psychiatric Pavilion on June 16, 1986. In other words, any acts of defendants after that time did not cause or contribute to plaintiff's injuries. Plaintiff's summary judgment evidence addressed the issue of whether he knew of a pattern of racketeering activity at any time prior to June of 1994. That question is irrelevant to a determination of whether plaintiff's claims are barred by limitations. Moreover, as was the case in Rotella I, the court concludes that there is no summary judgment evidence that would support findings in favor of plaintiff on all facts

essential to his discovery rule theory. No reasonable fact-finder could make a finding from the summary judgment evidence that plaintiff had not discovered the nature of his injury by the date of his discharge from Brookhaven, much less that he should not have discovered, in the exercise of reasonable care and diligence, the nature of his injury before that date.

The court ORDERS that the motions of defendants Wood, Lawlis, and DPA for summary judgment be, and are hereby, granted; that plaintiff take nothing on his claims against said defendants; and that plaintiff's claims be, and are hereby, dismissed with prejudice.

SIGNED October 21, 1997.

/s/ John McBryde
JOHN McBryde
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-11279

MARK ROTELLA

Plaintiff-Appellant

v.

ANGELA M WOOD, MD; ET AL

Defendants

ANGELA M WOOD, MD; GARY LEE ETTER, MD PA; WILLIAM M PEDERSON, MD; GROVER LAWLIS, MD; DAVID R BAKER, MD; LARRIE W ARNOLD, MD; FRED L GRIFFIN, MD; LESLIE H SECREST, MD; JOHN M ZIMBUREAN, MD; BRADFORD M GOFF, MD; DALLAS PSYCHIATRIC ASSOCIATES; DAVID R BAKER, MD PA; LARRIE W ARNOLD, MD PA; LESLIE H SECREST, MD PA; WILLIAM M PEDERSON, MD PA; FRED L GRIFFIN, MD PA; BRADFORD M GOFF, MD PA; GROVER LAWLIS, MD PA; ANGELA M WOOD, MD PA; JOHN M ZIMBUREAN, MD PA; GARY LEE ETTER, MD

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 7/30/98, 5 Cir., _____, _____ F.3d _____)

(Filed Aug. 28, 1998)

Before REYNALDO G. GARZA, SMITH and BENAVIDES, Circuit Judges.

PER CURIAM:

(X) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Reynaldo G. Garza
United States Circuit Judge
Chief Judge Politz did not participate in the consideration of the suggestion for rehearing en banc.

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§ 15b. Limitation of actions

Any action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.
